

RECEIVED
FEDERAL ELECTION
COMMISSION

2013 JUN -3 PM 4:42

CELA

FEDERAL ELECTION COMMISSION
999 E Street, N.W.
Washington, D.C. 20463

FIRST GENERAL COUNSEL'S REPORT

MUR: 6667

DATE COMPLAINT FILED: October 18, 2012

DATE OF NOTIFICATION: October 25, 2012

DATE OF LAST RESPONSE:

December 17, 2012

DATE ACTIVATED: March 5, 2013

EXPIRATION OF SOL:

October 2, 2017 (earliest)

October 16, 2017 (latest)¹

COMPLAINANT:

Michael J. Fontneau, Deputy Campaign Manager
for Schilling for Congress

RESPONDENTS:

Cheri Bustos
Friends of Cheri Bustos and Jeanette Hunter in her
official capacity as treasurer
House Majority PAC and Shannon Roche in her
official capacity as treasurer

**RELEVANT STATUTES
AND REGULATIONS:**

2 U.S.C. § 434(b)

2 U.S.C. § 441a(a), (f)

2 U.S.C. § 441b

11 C.F.R. § 109.21

11 C.F.R. § 109.23

INTERNAL REPORTS CHECKED:

Disclosure Reports

FEDERAL AGENCIES CHECKED:

None

¹ The latest statute of limitations date is based on the last expenditure that House Majority PAC made in connection with the Congressional race between Cheri Bustos and Schilling, as listed in its disclosure reports filed with the Commission. As discussed *infra*, based on publicly available information it appears that these expenditures relate to the ad at issue in this matter.

13044344221

I. INTRODUCTION

This matter concerns allegations that House Majority PAC made excessive or prohibited in-kind contributions to the Friends of Cheri Bustos (the "Committee") by republishing the Committee's campaign materials in an advertisement. The Complaint does not allege that the republication of materials was coordinated with the candidate or the Committee but states that Bustos and the Committee were prohibited from receiving this "illegal contribution."

As discussed below, House Majority PAC aired an ad that contained video footage created by the Committee. Its use of the Committee's campaign materials, even "in part," constitutes an in-kind contribution to the Committee.² Therefore, we recommend that the Commission find reason to believe that House Majority PAC violated 2 U.S.C. §§ 441a(a), 441b(a), and 434(b), by making excessive and prohibited in-kind contributions to the Committee when it republished campaign materials, and by failing to disclose the expenditures as contributions to the Committee. Because the available information indicates that House Majority PAC obtained the video footage from a publicly available source and not in coordination with the Committee, we recommend that the Commission find no reason to believe that Cheri Bustos and the Committee violated 2 U.S.C. §§ 441a(f) or 441b(a) by accepting an excessive or prohibited in-kind contribution from House Majority PAC.

II. FACTUAL AND LEGAL ANALYSIS

A. Factual Background

Cheri Bustos and Robert "Bobby" Schilling were candidates in the 2012 general election for Illinois's 17th Congressional District. On August 17, 2012, the Committee posted a video of Cheri Bustos on its YouTube channel promoting her candidacy, with a description stating "Cheri

² 11 C.F.R. § 109.23(a).

13044344222

1 Bustos: Working mother who's determined to fix Washington's priorities and fight for the
2 middle class!"³ The video is two minutes and 38-seconds long and consists of footage of Bustos
3 with her family and interacting with constituents at a restaurant, a farm, a factory, and various
4 other settings. There is no audio or text as part of the footage.

5 Approximately six-and-a-half weeks later, on October 2, 2012, House Majority PAC, an
6 independent expenditure-only political committee,⁴ began airing a 33-second television
7 advertisement entitled "Back" that used some of the Committee's footage from the August 2012
8 YouTube video.⁵ The October 2012 video, which contained an audio track, urges defeat of
9 Congressman Robert Schilling, Bustos's general election opponent, and advocates the election of
10 Bustos.⁶ The video begins with an image of Schilling and the statement that it "[d]idn't take

³ See Cheri Bustos for Congress, BustosForCongress YouTube Channel (Aug. 17, 2012), http://www.youtube.com/watch?v=kR_iG2F69Qw&list=UUagtX7neO7QL-KiZXRmV6Hq&index=7.

⁴ House Majority PAC registered as an independent expenditure-only committee with the Commission on April 8, 2011, indicating that it "intends to raise funds in unlimited amounts" but that it "will not use those funds to make contributions, whether direct, in-kind, or via coordinated communications, to federal candidates or committees." See <http://images.nictusa.com/pdf/035/11030591035/11030591035.pdf>. It has not established a separate account for contributions subject to the limitations and prohibitions of the Federal Election Campaign Act of 1971, as amended. See Stipulated Order and Consent Judgment in *Carey v. FEC*, No. 11-259-RMC (Aug. 19, 2011); see also FEC Statement on *Carey v. FEC*: Reporting Guidance for Political Committees that Maintain a Non-Contribution Account (Oct. 5, 2011), <http://www.fec.gov/press/Press2011/20111006postcarey.shtml>. On February 15, 2013, we circulated a report in a separate matter also involving House Majority PAC's republication of campaign materials. See First Gen. Counsel's Rpt., MUR 6617 (Vilsack for Iowa) ("First GCR"). As of this date, that matter is still pending before the Commission.

⁵ House Majority PAC Resp. at 1 (Dec. 17, 2012) (stating that it began airing the ad on October 2, 2012). The ad was also uploaded to YouTube. See IL-17: Bobby Schilling - "Back," HouseMajorityPAC YouTube Channel (Oct. 2, 2012), <http://www.youtube.com/watch?v=xWYtpfRSfB0>. Press articles indicate that the ad aired during the weeks of October 2 and October 16, 2012. See *House Majority PAC Hits Republicans in Six New TV Spots; New Expenditures Total Nearly \$1.2 Million* (Oct. 2, 2012), <http://www.thehousemajoritypac.com/ads/2012/10/02/bobby-schilling-back-2/> (stating that "Back" will air in Peoria, IL for a week); *House Majority PAC unveils New TV Ads in FL-18, IL-10, MN-08 Plus Expansion of IL-17 Spot* (Oct. 16, 2012), <http://www.thehousemajoritypac.com/ads/2012/10/16/allen-west-alzhelmors/> (announcing that the "Back" ad would run for another week, this time in Rockford, IL).

⁶ Compl. at Attach. 1 (providing transcript of the "Back" ad along with the Complaint); House Majority PAC Resp. at 1-2 (including transcript of the "Back" ad).

13044344223

1 long for Bobby Schilling to turn his back on Illinois families.”⁷ Later in the ad, the narrator
2 speaks favorably of Bustos, stating that “[s]he’s got our back. She’ll stop tax breaks for
3 outsourcers. And fight for the middle class.”⁸ The ad shows segments from the Committee’s
4 original video footage of Bustos meeting with constituents at various settings including a
5 restaurant, factory, and a farm. This background footage appears for approximately 11 seconds
6 of the 33-second ad. The segments used in the ad do not appear in the same order as in the
7 original Committee YouTube video.

8 The Complaint asserts that House Majority PAC admits it used the Committee’s footage
9 when the PAC included the words “Bustos b-roll” “in a side-by-side script provided to the
10 television station.”⁹ The Complaint also describes the specific video images of Bustos in the
11 “Back” ad that are identical to segments of the original Committee video.¹⁰ The Complaint
12 alleges that because, as an independent expenditure-only committee, House Majority PAC is
13 prohibited from making a direct or in-kind contribution to a federal campaign committee, the
14 PAC’s “costs of conceptualizing, producing, and broadcasting this advertisement” were an
15 illegal contribution to the Committee.¹¹

16 In its Response, House Majority PAC acknowledges that it aired “Back” on television to
17 advocate the defeat of Schilling and election of Bustos, but claims that the message in the ad was
18 crafted independently of any candidate or political party committee using publicly available

⁷ Compl. at Attach. 1; House Majority PAC Resp. at 1.

⁸ Compl. at Attach. 1; House Majority PAC Resp. at 2.

⁹ That “side-by-side script” is attached to the Complaint. Compl. at 1 and Attach. 2 at 7. B-roll is apparently a term of art that refers to supplemental or alternate footage, intercut with the main shot.

¹⁰ *Id.* at 2.

¹¹ Compl. at 3.

13044344224

1 footage of both Schilling and Bustos.¹² It states that it “excerpted footage from a video that Ms.
2 Bustos’[s] campaign had made publicly available on its YouTube channel in August 2012” and
3 that it used five excerpts from the video for its television ad, for a total of 11 seconds.¹³ House
4 Majority PAC argues that “the incidental use of publicly available video excerpts does not
5 constitute ‘republishing,’ particularly where . . . the excerpts do not contain any discernible
6 message of their own and are used solely to provide background imagery.”¹⁴ It also claims that it
7 “relied reasonably” on Commission precedents that dismissed complaints alleging that the use of
8 campaign photos or videos as background images constituted republication, and that given these
9 dismissals, to make a finding against House Majority PAC would be unfair and amount to
10 “disparate treatment of persons in similar circumstances.”¹⁵

11 House Majority PAC disclosed expenditures in connection with the ad in reports filed
12 with the Commission. Based on its independent expenditure reports and press accounts of the
13 ad, it appears that House Majority PAC paid media firm Waterfront Strategies \$289,362.81 for
14 the “Back” ad and that it was scheduled to air on television stations for at least

¹² House Majority PAC Resp. at 1.

¹³ *Id.* at 2-3.

¹⁴ *Id.* at 3.

¹⁵ *Id.* at 5.

1 two weeks.¹⁶ House Majority PAC spent a total of \$30,470,335 on independent expenditures
2 during the 2012 election cycle. Of that amount, it spent \$591,650.00 on the Schilling-Bustos
3 race, and, based on the 24/48 Hour Reports it filed with the Commission, it made independent
4 expenditures for this race in June, July, September, and October 2012.

5 The Committee submitted a separate response requesting a dismissal and stating that the
6 Commission erred in naming it as a respondent because the Complaint does not allege that the
7 Committee violated the Federal Election Campaign Act of 1971, as amended (the "Act").¹⁷ It
8 also notes that the Complaint does not allege that the Committee and House Majority PAC
9 coordinated the ad, and claims that there was, in fact, no coordination.¹⁸

10 **B. Legal Analysis**

11 Under the Act, the "financing by any person of the dissemination, distribution or
12 republication, in whole or *in part*, of any broadcast or any written, graphic, or other form of
13 campaign materials prepared by the candidate's authorized committee, or authorized agents shall
14 be considered an expenditure."¹⁹ The republication of campaign materials prepared by a
15 candidate's authorized committee is also an in-kind contribution, because the person financing
16 the republication "has provided something of value to the candidate [or] authorized

¹⁶ It appears that the following disbursements that House Majority PAC made to media vendor Waterfront Strategies may relate to the "Back" ad: payments in the amounts of \$50,295.20, \$109,223.06, and \$10,754.15 made on October 2, 2012, and payments in the amounts of \$236 and \$118,854.40 made on October 16, 2012. *See* House Majority PAC 24/48 Hour Notices of Independent Expenditures ("24/48-Hour Reports") (Oct. 4, 2012 and Oct. 16, 2012); *supra* n.5. We cannot state with certainty, however, that these were the only expenditures related to "Back" or that these payments were exclusively related to "Back" because the Committee's 24/48 Hour Reports only list Schilling's name on the reports without specifying the name of the relevant ad.

¹⁷ Committee Resp. at 1-2 (Dec. 17, 2012).

¹⁸ *Id.* at 2.

¹⁹ 2 U.S.C. § 441a(a)(7)(B)(iii) (emphasis added). For republication, the Commission has concluded that "campaign materials" include any material belonging to or emanating from a campaign. *See, e.g.*, MUR 5743 (Betty Sutton) (candidate photo obtained from campaign website); MUR 5672 (Save American Jobs) (video produced and used by candidate's campaign subsequently hosted on association's website).

1 committee.”²⁰ The Commission has explained that “Congress has addressed republication of
2 campaign materials through 2 U.S.C. § 441a(a)(7)(B)(iii) in a context where the candidate/author
3 generally views republication of his or her campaign material, *even in part*, as a benefit” and
4 “can be reasonably construed only as for the purpose of influencing an election.”²¹

5 The Commission created an exemption for grassroots activity on the Internet that allows
6 individuals to republish campaign materials on the Internet without making a contribution or
7 expenditure.²² This exception, however, does not exempt from the definition of “contribution”
8 any “public communication” that involves the republication of such materials.²³ For example, a
9 contribution would result “if an individual downloaded a campaign poster from the Internet and
10 then paid to have the poster appear as an advertisement in the New York Times.”²⁴

11 Here, House Majority PAC disseminated campaign materials produced by the Committee
12 when it aired the “Back” ad on television. House Majority PAC admits to obtaining the footage
13 of Bustos directly from a video the Committee prepared and uploaded to its YouTube channel in
14 August 2012, and paying for production costs and air time to broadcast the ad on television
15 featuring some of that footage. By using the Committee’s original video footage, the
16 Respondents have republished campaign material in their ad and, as a consequence, made in-
17 kind contributions to the Committee.

²⁰ *Coordinated and Independent Expenditures*, 68 Fed. Reg. 442, 442 (Jan. 3, 2003).

²¹ *Id.* at 443 (emphasis added); *Coordinated Communications*, 71 Fed. Reg. 33,190, 33,191 (June 8, 2006).

²² *See Internet Communications*, 71 Fed. Reg. 18,589, 18,604 (Apr. 12, 2006); *see also* 11 C.F.R. §§ 100.94, 100.155.

²³ A “public communication” is defined as a communication by means of any broadcast, cable or satellite communication, newspaper, magazine, outdoor advertising facility, mass mailing or telephone bank, or any other form of general political advertising. 11 C.F.R. § 100.26.

²⁴ *See* 71 Fed. Reg. at 18,604.

13044344227

1 House Majority PAC argues that the video footage of Bustos does not amount to
2 republication because it is publicly available, an "incidental" part of their ads, and intended
3 merely as background.²⁵ But the plain language of the statute and Commission regulation
4 provides that the use "in whole or in part," of any campaign material prepared by the campaign is
5 republication and will result in an in-kind contribution.²⁶ Moreover, in a 2003 rulemaking, the
6 Commission rejected arguments to "permit the republication of campaign slogans and other
7 limited portions of campaign materials for analysis and other uses," and to permit the use of
8 "original campaign material that already exists in the public domain."²⁷ The Commission
9 rejected the proposed exceptions, explaining that they could "swallow the rule."²⁸ Accordingly,
10 based on the Act's instruction that use of a candidate's campaign materials — even "*in part*" —

²⁵ In support of these points, the House Majority PAC's response relies, in part, on the analysis from the Statements of Reasons of Chair Hunter and Commissioners McGahn and Petersen in MURs 5879 (Democratic Congressional Campaign Comm.) (Feb. 28, 2012) ("DCCC") and 6357 (American Crossroads) (Feb. 22, 2012), matters where the Commission considered allegations of republication. House Majority PAC Resp. at 3-4. The Commission was equally divided on whether to enter into conciliation with the DCCC in MUR 5879 and whether to find reason to believe that American Crossroads violated the Act in MUR 6357. Additionally, in MUR 6357, a second Statement of Reasons was issued setting forth a different analysis of the republication issue. See Statement of Reasons, Comm'rs. Weintraub, Bauerly & Walther, MUR 6357 (American Crossroads).

²⁶ See 2 U.S.C. § 441a(a)(7)(B)(iii) and 11 C.F.R. § 109.23.

²⁷ 68 Fed. Reg. at 442-43.

²⁸ *Id.* In some cases, the Commission has found that a third party republished campaign materials but declined to pursue the apparent violation because the value of the contribution was likely *de minimis* or because the republished material was only an incidental part of the overall communication (such as the use of a stock photo obtained from a campaign website). In such cases, the Commission has issued admonishments or taken no further action. See MUR 5743 (Betty Sutton) (Commission admonished committee after determining that republished candidate photo was incidental and likely of *de minimis* value); MUR 5996 (Tim Bee) (Commission exercised prosecutorial discretion to dismiss allegation that group republished photo of candidate that comprised two seconds of a 30-second ad and was downloaded at no charge from candidate's publicly available website). The video footage here, however, cannot be likened to these *de minimis* usos; unlike a photo displayed on a screen for a few fleeting seconds, the video footage was a material part of the ads, comprising 11 seconds of a 33-second television ad.

1 constitutes republication, we conclude that the ads republished campaign materials and
2 "provided something of value to the candidate [or] authorized committee."²⁹

3 Therefore, we recommend that the Commission find reason to believe that House
4 Majority PAC violated 2 U.S.C. §§ 441a(a), 441b(a), and 434(b), by making prohibited and
5 excessive in-kind contributions to the Committee when it republished its campaign materials,
6 and by failing to disclose the expenditures as contributions to the Committee.³⁰

7 We do not recommend that the Commission find reason to believe that Bustos or the
8 Committee violated the Act. As the recipient of an alleged republication benefit, the candidate
9 or committee that prepared the original video footage of the candidate "does not receive or
10 accept an in-kind contribution, and is not required to report an expenditure, unless the
11 dissemination, distribution, or republication of campaign materials is a coordinated
12 communication under 11 CFR 109.21 or a party coordinated communication under 11 CFR

²⁹ See 68 Fed. Reg. at 442-43 (stating that Congress has addressed republication . . . even in part, as a benefit to the candidate); 2 U.S.C. § 441a(a)(7)(B)(iii).

³⁰ As an independent expenditure-only committee, House Majority PAC is permitted to, and did, accept corporate contributions, contributions from labor organizations, and contributions that exceed the monetary limits of the Act. It may not, however, use those funds to make contributions, whether direct or in-kind, to a candidate's committee. While section 441b(a) does not expressly prohibit a political committee from making a contribution using corporate funds, the provision was originally enacted on the premise that committees could not accept corporate contributions at all. In enforcing the ban on corporate contributions in the context of party committees using non-federal funds for federal activities, the Commission has taken the position that a political committee may violate section 441b(a) by spending or disbursing corporate funds. See, e.g., MUR 3774 (National Republican Senatorial Committee) (finding probable cause to believe that party committee violated 2 U.S.C. §§ 441b and 441a(f) and 11 C.F.R. § 102.5(a) by using prohibited and excessive funds for Get Out the Vote activities that benefited federal candidates); *FEC v. California Democratic Party*, 2004 WL 865833, Civ. No. 03-0547 (E.D. Cal. Feb. 13, 2004) (holding state party committees violated section 441b and 11 C.F.R. § 102.5 by using non-federal funds to make disbursements for advertisements constituting independent expenditures).

Because the republication of the Committee's campaign materials resulted in an in-kind contribution from House Majority PAC to the Committee, we believe it appropriate to recommend that the House Majority PAC violated 2 U.S.C. §§ 441a(a) and 441b(a) by using funds outside of the limits and prohibitions of the Act to make the contribution. This recommendation is consistent with our reason to believe recommendation in MUR 6617 involving House Majority PAC's republication of another campaign's materials. See First GCR at n.38, MUR 6617.

13044344229

1 109.37.³¹ The Complaint does not make any coordination allegations and both House Majority
2 PAC and the Committee deny that they coordinated on the "Back" ad. House Majority PAC
3 contends that it obtained the Committee video footage directly from a publicly available website,
4 and we are aware of no facts to the contrary. Accordingly, we recommend that the Commission
5 find no reason to believe that Bustos or the Committee violated 2 U.S.C. §§ 441a(f) or 441b by
6 accepting an excessive or prohibited in-kind contribution from House Majority PAC in
7 connection with republished campaign materials.

8
9
10
11
12
13
14
15
16
17
18
19
20
21

³¹ 11 C.F.R. § 109.23(a).

13044344230

1

2

3

4

5

6

7

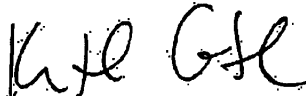
13044344231

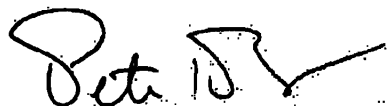
IV. RECOMMENDATIONS


1. Find reason to believe that House Majority PAC and Shannon Roche in her official capacity as treasurer violated 2 U.S.C. §§ 441a(a), 441b(a), and 434(b).
2. Find no reason to believe that Cheri Bustos and Friends of Cheri Bustos and Jeanette Hunter in her official capacity as treasurer violated 2 U.S.C. §§ 441a(f) or 441b(a), and close the file as to them.
3. Approve the attached Factual and Legal Analyses.
4. Enter into conciliation with House Majority PAC and Shannon Roche in her official capacity as treasurer prior to a finding of probable cause to believe.
5. Approve the proposed attached conciliation agreement with House Majority PAC and Shannon Roche in her official capacity as treasurer.
6. Approve the appropriate letters.

Anthony Herman
General Counsel

6-3-13
Date


Kathleen M. Guith
Deputy Associate General Counsel
for Enforcement


Peter G. Blumberg
Assistant General Counsel


Ana J. Peña-Wallace
Attorney

1
2
3
4

13044344233